FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
GARY H. SCHWARTZ
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Attorneys for Respondent

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 33289—50—6-27-86)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Obscenity Statute is constitutionally infirm under the First and Fourteenth Amendments to the United States Constitution in light of this Court's decision in *Brockett v. Spokane Arcades, Inc.*, ___ U.S. ___, 105 S.Ct. 2794 (1985).

2. Whether petitioner raises an issue worthy of this Court's attention when he incorrectly asserts that an objective standard be used in the application of the third prong of the *Miller v. California* test for obscenity.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT:	
I.	
THIS COURT HAS ALREADY UPHELD THE ILLINOIS OBSCENITY STATUTE AS CONSTITUTIONAL	4
A.	
This Court's Decision In *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 105 S.Ct. 2794 (1985) Has No Effect On The Constitutionality Of The Illinois Obscenity Statute	4
B.	
The Evidentiary Section Is Consistent And Unambiguous	6
II.	
STATES ENJOY THE RIGHT TO CHOOSE THE APPROPRIATE STANDARD TO BE APPLIED TO THE THIRD PRONG OF THE *MILLER* TEST FOR OBSCENITY	8
CONCLUSION	10

APPENDIX

A— United States Constitution, First Amendment and Fourteenth Amendment ..... App. 1

B— Illinois Obscenity Statute, Ill. Rev. Stat. 1983, ch. 38, ¶11-20 ..... App. 2

C— Illinois Obscenity Statute, Ill. Rev. Stat. 1986, ch. 38, ¶11-20 ..... App. 5

TABLE OF AUTHORITIES

CASES PAGE

Brockett v. Spokane Arcades, Inc., ____ U.S. ____, 105 S.Ct. 2794 (1985) 4, 5

Eagle Books v. Reinhard, 418 F.Supp. 345 (N.D. Ill. 1976) 4

Memoirs v. Massachusetts, 383 U.S. 413 (1966) .. 9

Miller v. California, 413 U.S. 15 (1973) 8, 9

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 9

People v. Brocic, 80 Ill. App. 2d 65, 224 N.E.2d 572 (1967) 7

People v. Gould, 60 Ill.2d 159, 324 N.E.2d 412 (1975) 4, 6

People v. Nelson, 88 Ill. App. 3d 196, 410 N.E.2d 476 (1980) 7

People v. Ridens, 59 Ill.2d 362, 321 N.E.2d 264 (1974) 4, 9

People v. Sikora, 32 Ill.2d 260, 204 N.E.2d 768 (1965) 4

State v. Princess Cinema of Milwaukee, Inc., 96 Wis.2d 646, 292 N.W.2d 807 (1980) 9

United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982) 9

United States v. Heyman, 562 F.2d 316 (4th Cir. 1977) 9

Ward v. Illinois, 431 U.S. 767 (1977) 4, 5, 9

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, First Amendment ... 2

United States Constitution, Fourteenth Amendment 2

Ill. Rev. Stat. 1983, ch. 38, ¶11-20 ..... 2, 4, 6, 7

Wash. Rev. Cod. §7.48A.010(8) (1983) 5

ANNOTATIONS

Smith Hurd Illinois Annotated Statutes, ch. 38, §11-20 7

No. 85-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD POPE and CHARLES G. MORRISON,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the judgments and opinions of the Appellate Court of the State of Illinois, Second District, entered on November 26, 1985.

OPINIONS BELOW

The petitioner seeks review from an Illinois Appellate Court, Second District, opinion in *People v. Pope*, reported at 138 Ill. App. 3d 726, 486 N.E.2d 350 (1985). The petitioner seeks review from an Illinois Appellate Court, Second District, opinion in *People v. Morrison*, reported at 138 Ill. App. 595, 486 N.E.2d 345 (1985). Copies of these opinions are included with petitioners' petition. The petitioners' petition for leave to appeal to the Illinois Supreme Court was denied on April 2, 1986.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition. As treated more fully in the argument contained herein, however, petitioners have not shown grounds for this Court to exercise its sound discretion to grant the Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the Illinois Obscenity Statute, Ill. Rev. Stat. 1983, ch. 38, ¶11-20 are set forth in Appendix A and B. The most recent revision of the Illinois Obscenity Statute, which became effective January 1, 1986, is set forth in Appendix C.

STATEMENT OF FACTS

Petitioners were clerks in two different adult bookstores. Each was charged with three counts of obscenity arising out of the sale of obscene magazines. After separate jury trials, each petitioner was convicted on all three counts.

Motions to dismiss were filed in both cases asserting that the Illinois Obscenity Statute is unconstitutionally vague and overbroad and therefore in violation of petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States. Additionally, petitioners argued that the Illinois Obscenity Statute is constitutionally infirm for failing to require that an objective standard be applied to the third part of the *Miller* Test for Obscenity. These motions were denied.

On appeal, the cases were consolidated for oral argument in the Appellate Court for the State of Illinois, Second District. The Appellate Court also rejected petitioners' constitutional arguments. Petitions for leave to appeal were filed, and denied by the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY UPHELD THE ILLINOIS OBSCENITY STATUTE AS CONSTITUTIONAL.

A.

This Court's Decision In *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 105 S.Ct. 2794 (1985) Has No Effect On The Constitutionality Of The Illinois Obscenity Statute.

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decision below. This Court, as well as the Illinois courts, have reviewed and rejected constitutional attacks on any alleged overbroad construction of the Illinois Obscenity Statute as contained in ch. 38, ¶11-20(b) of the Illinois Revised Statutes. See *Ward v. Illinois*, 431 U.S. 767 (1977); *Eagle Books v. Reinhard*, 418 F. Supp. 345 (N.D. Ill. 1976). See generally *People v. Sikora*, 32 Ill.2d 260, 204 N.E.2d 768 (1965); *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975); *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974).

In *Ward v. Illinois*, 431 U.S. 767 (1977), this Court examined the Illinois Obscenity Statute and held that it is neither vague nor overbroad. The Court cited the Illinois Supreme Court decision in *People v. Sikora*, 32 Ill.2d 260, 204 N.E.2d 768 (1965), and concluded that the construction of the statute gives detailed meaning to the Illinois law and is not vague. *Ward, supra* at 772. Additionally, this Court went on to hold that the statute is not overbroad nor open-ended and is not vulnerable to attack in this respect. Moreover, the Illinois courts, in interpreting the statute, have been aware of the need for specificity,

and have properly comported with the *Miller* test for obscenity. *Ward, id.* at 775-776.

Petitioner claims that with this Court's recent decision in *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 105 S.Ct. 2794 (1985), the Illinois obscenity statute can now be considered constitutionally infirm as it is overbroad and proscribes materials appealing to a normal healthy interest in sex. Petitioners' assertion is feeble to say the least.

In *Brockett*, this Court found that the definition of obscenity, as contained in a Washington statute, was overbroad in that the word "prurient", which is common to most obscenity statutes, was defined as "that which incites lasciviousness or lust". Wash. Rev. Cod. §7.48A.010(8) (1983). The United States Court of Appeals struck down the statute in its entirety as such a definition would allow the statute to reach constitutionally protected material that stimulated normal sexual response. This Court reversed that decision, holding that the statute was infirm only insofar as the use of the word "lust" in the statute was concerned. This Court held that the lower court could merely have exercised the word "lust", as it refers to normal interests in sex. "Lasciviousness" is proper as it would mean a shameful or morbid interest in sex. See *Brockett, supra*, pp. 2802-2803.

Petitioners maintain the analogy that as in the Washington statute, the Illinois statute is unconstitutional in that its definition of "prurient" is ambiguous, and that an evidentiary rule contained in section (c)(2) of the same statute allows proscription of materials relating to a normal, healthy interest in sex.

This analogy, which appears in section 1 of petitioners' petition and constitutes the bulk of their brief, is completely without merit. First, the statute as it appeared

in 1983 was clear and concise in its definition of "prurient". It left no room to proscribe materials relating to normal, healthy interests in sex. The word "lust" is not even evident in the Illinois statute as it was in the Washington statute. Moreover, the word "prurient" is very specifically defined as "a shameful morbid interest in nudity, sex, or excretion; going substantially beyond the customary limits of candor in description or representation of such matters." Ill. Rev. Stat., ch. 38, ¶11-20(b). These words in and of themselves clearly indicate that materials illiciting a normal healthy interest in sex are not to be reached, and are plainly consistent with this Court's holding in *Brockett*.

Petitioners claim that the Illinois Supreme Court decision in *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975), is a good illustration of how the Illinois statute can proscribe constitutionally protected material. Respondent fails to see any validity to the claim. Petitioners assert that the photos reviewed by the Court in *Gould* were not "hard core" and of the genre of photos depicted in Playboy and Penthouse magazines. Respondent assumes that petitioner alleges that photos in these magazines would be constitutionally protected. The court, in *Gould*, gives an ample description of the materials on pages 413 and 415 and renders a very clear opinion as to the nature of the obscenity. Petitioners' attempt to categorize the materials reviewed in *Gould* as not being "hard core", and therefore appealing to the normal sexual interest, is based on mere conjecture.

B.

The Evidentiary Section Is Consistent And Unambiguous.

Petitioners also allege that the evidentiary clause contained in the statute lends to the ambiguity and is incon-

sistent with the definition of "prurient". It appears that petitioners completely misinterpret the application of the clause. The evidentiary section is clear and concise. Upon examination, any reasonable individual could readily determine that it has absolutely nothing to do with the section set up to define "prurient".

The evidentiary section states the following:

> In any prosecution for an offense under this Section evidence shall be admissible to show:
>
> * * *
>
> What the predominant appeal of the material would be for ordinary adults or a special audience and what effect if any, it would probably have on the behavior of such people . . . Ill. Rev. Stat. 1983, ch. 38, ¶11-20(c)(2).

This clause does not provide an exclusive test of the types of evidence which may be admissible as bearing on the question of obscenity. These provisions are only listed to serve as a guide and deter a trial court from holding every one of the types to be inadmissible in a proper case. S.H.A. Ill. Stats. Anno. ch. 38, §11-20, p. 371. They allow the defendant the right to introduce the best evidence he can gather on the issue, so that the trier of fact can discern the state standard for obscenity and judge the questioned material accordingly. This evidentiary rule helps to deter the imposition of personal standards. See *People v. Nelson*, 88 Ill. App. 3d 196, 410 N.E.2d 476, 479 (1980); *People v. Brocic*, 80 Ill. App. 2d 65, 224 N.E. 2d 572, 576 (1967).

In short, this Court has already declared that the Illinois statute on obscenity is constitutional. The statute is neither vague, overbroad, ambiguous, nor inconsistent. Moreover, the *Brockett* decision does not render the statute open to further attack.

II.

STATES ENJOY THE RIGHT TO CHOOSE THE APPROPRIATE STANDARD TO BE APPLIED TO THE THIRD PRONG OF THE *MILLER* TEST FOR OBSCENITY.

Petitioners' second allegation is that the Illinois Obscenity Statute fails to require the use of an objective standard when applying the third part of the "*Miller* Test" for obscenity.

The basic guidelines for the trier of fact as set forth in *Miller* must be:

> (a) Whether the average person, applying contemporary community standards would find the work taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24, 25 (1973).

An examination of the *Miller* opinion reveals this Court's awareness of the potential for confusion by mandating objective standards. "Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact. . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Miller, supra* at 31-32. "To require a state to structure obscenity proceedings around evidence of a national community standard would be an exercise in futility." *Miller, id.* at 30.

The third prong of the *Miller* test merely sets forth a minimum requirement for the determination of obscenity. *Id.* at 26. With regard to this prong of the test, each state has been allowed to choose the point, at or above which, prurient material loses constitutional protection. As its minimum requirement, Illinois has chosen the "utterly without redeeming social value" standard of *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), in preference to the more relaxed criterion contained in part (c) of the *Miller* guidelines. See *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *Ward v. Illinois*, 431 U.S. 774 (1977).

It is not the function of this Court to propose regulatory schemes for the states. *Miller* at 25. Petitioner cites *United States v. Heyman*, 562 F.2d 316 (4th Cir. 1977); *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982); and *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 807 (1980), four isolated instances in which three federal courts and one state court ruled that it was error for the court to instruct that a subjective standard be used in determining part (c) of the test. These cases are immaterial. All of these courts, in accordance with *Miller*, acknowledge the states' right to choose the standard.

In the instant case, the Illinois Appellate Court opinions do not set forth an in depth analysis with respect to the use of specific standards as applied to part (c) of the *Miller* test. In rendering their decisions, these courts followed, as they must, their own state Supreme Court rulings, all of which are in compliance with this Court's rulings in *Ward v. Illinois*, 431 U.S. 767 (1977), and *Miller v. California*, 413 U.S. 15 (1973). Thus, there is no inconsistency within the Illinois courts and no inconsisten-

cy between Illinois' rulings and this Court's decisions on obscenity.

Because this Court was purposeful in not mandating application of a specific standard to the third prong of the *Miller* test, and because Illinois rulings on obscenity are consistent and in compliance with this Court's decisions on obscenity, this case does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA J. STEWART
Solicitor General, State of Illinois

MARK L. ROTERT *
GARY H. SCHWARTZ
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

Attorneys for Respondent

* Counsel of Record

APPENDIX A

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Illinois Obscenity Statute,
Ill. Rev. Stat. 1983, ch. 38, ¶11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other rep esentation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes

substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

APPENDIX C

Illinois Obscenity Statute,
Ill. Rev. Stat. 1986, ch. 38, ¶11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense. A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, ap-

plying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is lacking in serious literary, artistic, political or scientific value.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.

P.A. 84-709 rewrote the definition of obscenity which prior thereto read:

"A thing is obscene if considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.";

And in the second paragraph of subd. (c), substituted "lacking in serious literary, artistic, political or scientific value" for "utterly without redeeming social importance".